



Billing Code: 4510-CM

## **DEPARTMENT OF LABOR**

### **Office of Federal Contract Compliance Programs**

41 CFR Parts 60-1, 60-2, 60-300, and 60-741

RIN 1250-AA10

### **Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination**

**AGENCY:** Office of Federal Contract Compliance Programs (OFCCP), Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of Federal Contract Compliance Programs (“OFCCP” or “the agency”) proposes to codify procedures that the agency currently uses to resolve potential discrimination and other material violations of these laws by federal contractors and subcontractors; add clarifying definitions to specify the types of evidence OFCCP will use to support its discrimination findings; and, correct the title of OFCCP’s agency head.

**DATES:** To be assured of consideration, comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments may be submitted, identified by Regulatory Information Number (RIN) 1250-AA10, by any of the following methods:

- Electronically: The Federal eRulemaking portal: <http://www.regulations.gov>. Follow the instructions found on that website for submitting comments.
- Mail, Hand Delivery, or Courier: Addressed to Harvey D. Fort, Deputy Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, D.C. 20210.

*Instructions:* Please submit one copy of your comments by only one method. For faster submission, we encourage commenters to transmit their comment electronically via the *www.regulations.gov* website. Comments that are mailed to the address provided above must be postmarked before the close of the comment period. All submissions received must include OFCCP's name and RIN for this rulemaking. Comments submitted in response to the notice, including any personal information provided, become a matter of public record and will be posted on *www.regulations.gov*. Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission was received by telephoning OFCCP at (202) 693-0103 (voice) or (202) 693-1337 (TTY) (these are not toll-free numbers).

The Department will make all comments received, including any personal information provided, available for public inspection during normal business hours at Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. Copies of this notice may be obtained in alternative formats (large print, braille, audio recording) upon request by calling the numbers listed above. To schedule an appointment to review the comments and/or to obtain this Notice of Proposed Rulemaking (NPRM) in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

**FOR FURTHER INFORMATION CONTACT:** Harvey D. Fort, Deputy Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, N.W., Room C-3325, Washington, D.C. 20210. Telephone: (202) 693-0103 (voice) or (202) 693-1337 (TTY).

**SUPPLEMENTARY INFORMATION:**

**I. Overview**

The goal of this proposed rule is to provide federal contractors and subcontractors<sup>1</sup> with greater certainty about the procedures that OFCCP follows during compliance evaluations to resolve employment discrimination and other material violations found under Executive Order 11246, as amended (E.O. 11246); section 503 of the Rehabilitation Act, as amended, 29 U.S.C 793 (section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C 4212 (VEVRAA); and, their implementing regulations.. The proposed rule would codify procedures for two formal notices that OFCCP uses when the agency finds potential violations: the Predetermination Notice (PDN) and the Notice of Violation (NOV). Since 1988, these procedures have been embedded in the Federal Contract Compliance Manual (FCCM), the primary document used by agency staff as a procedural framework to execute quality and timely compliance evaluations and complaint investigations. Additionally, the proposal promotes efficiency by clarifying that contractors have the option to expedite OFCCP's normal resolution procedures for discrimination findings by entering directly into a conciliation agreement prior to issuance of a PDN or NOV, allowing for expedited conclusion to OFCCP's compliance evaluations. The proposed rule also clarifies the strength of evidence agency staff must find before issuing a PDN or NOV. Finally, the proposed rule would replace outdated references to the official title of OFCCP's agency head, from "Deputy Assistant Secretary" to "Director."

This proposed rule is expected to be an Executive Order (E.O.) 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

## **II. Background**

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<sup>1</sup> Hereinafter, the terms "contractor" and "federal contractor" are used to refer to contractors and subcontractors with direct federal contracts and/or federally assisted construction contracts, unless otherwise expressly stated.

OFCCP administers and enforces E.O. 11246, section 503, and VEVRAA, and their implementing regulations. Collectively, these laws require federal contractors to take affirmative action to ensure equal employment opportunity, and not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Additionally, E.O. 11246 prohibits a contractor from discharging or otherwise discriminating against applicants or employees who inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

OFCCP determines whether a federal contractor has met these legal obligations during a compliance evaluation.<sup>2</sup> The agency uses a neutral process to schedule contractors for compliance evaluations.<sup>3</sup> A compliance evaluation consists of one or any combination of the following investigative procedures, as set forth in OFCCP's implementing regulations: compliance review, offsite review of records, compliance check, or focused review.<sup>4</sup> With the exception of the compliance check, the purpose of which is solely to determine whether the contractor maintains required records, OFCCP may find that a contractor discriminated in hiring, promotion, termination, compensation, or other employment practices based on information collected during a compliance evaluation. Such findings, in most cases, must be supported by statistical evidence.

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<sup>2</sup> OFCCP also ensures compliance with these laws by investigating complaints filed by applicants and employees who believe that a federal contractor discriminated against them. However, the resolution procedures for complaints differ from compliance evaluations and would not be altered by this proposed rule. For complaint resolution procedures, see FCCM Chapter 6 and 41 CFR 60-1.24, 41 CFR 60-300.61, and 41 CFR 60-741.61. The FCCM is available at <https://www.dol.gov/ofccp/regs/compliance/fccm/fccmanul.htm> (last accessed Aug. 5, 2019).

<sup>3</sup> The majority of OFCCP's compliance evaluations are for supply and service contractors. OFCCP increased the number of contractors on its supply and service scheduling list over the past three fiscal years, from 801 in FY 2017 to 3,500 in FY 2019. A description of OFCCP's current scheduling methodology for supply and service contractors is available on the agency's website at <https://www.dol.gov/ofccp/scheduling/> (last accessed Aug. 12, 2019). The neutral scheduling process for construction contractors is currently under review by OFCCP.

<sup>4</sup> See 41 CFR 60-1.20(a), 60-300.60(a) and 60-741.60(a). The resolution procedures described in this proposed rule would not apply to compliance checks.

Preliminary findings of discrimination in a compliance evaluation trigger OFCCP's resolution procedures. When OFCCP finds sufficient evidence of discrimination, the agency sends a PDN to inform the contractor of the agency's preliminary findings.<sup>5</sup> To determine whether the evidence of discrimination is sufficient to warrant a PDN, OFCCP considers whether an employment or compensation disparity identified during the compliance evaluation is both practically and statistically significant.<sup>6</sup> OFCCP uses a number of tests to determine whether an employment selection or compensation practice has enough statistical significance to support a conclusion of discrimination.<sup>7</sup> The most familiar test is the standard deviation test. The standard deviation test represents a standardized measure of the difference between two selection rates, and employment discrimination case law has adopted confidence levels that are similar to those accepted among social scientists. The U.S. Supreme Court has described an outcome as "suspect to a social scientist" when a statistic from "large samples" falls more than "two or three standard deviations" from its expected value under a null hypothesis of neutrality.<sup>8</sup> The greater the number of standard deviations, the less likely the difference was produced by chance (*e.g.*, 5.0 standard deviations represents a less than 1 in 1.7 million probability that the occurrence

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<sup>5</sup> See Directive 2018-01, "Use of Predetermination Notices (PDN)" (Feb. 27, 2018). OFCCP issued this directive to ensure that PDNs be used in all compliance evaluations with preliminary discrimination findings, both individual and systemic. OFCCP directives are available at <https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm> (last accessed Aug. 5, 2019). Prior to the directive, use of PDNs was discretionary and reserved for systemic discrimination findings. See FCCM, Chapter 8, Resolution of Noncompliance (Oct. 2014) (detailing the procedures that OFCCP follows for issuing PDNs).

<sup>6</sup> In the EEO context, practical significance refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group. The concept focuses on the contextual impact or importance of the disparity rather than its likelihood of occurring by chance. OFCCP recently published guidance on how it applies statistical and practical significance to evaluate compliance evaluations with potential discrimination. See OFCCP's Practical Significance Frequently Asked Questions at <https://www.dol.gov/ofccp/regs/compliance/faqs/PracticalSignificanceEEOFAQs.htm#Q5> (last accessed October 1, 2019).

<sup>7</sup> Some examples of the statistical measures that OFCCP may use are the Chi square, Fisher's exact, Z-test, and standard deviation.

<sup>8</sup> See *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) ("As a general rule for large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist."). See also *Hazelwood School Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977) (providing that "a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race").

happened by chance). OFCCP conducts regression analyses of hiring and compensation outcomes which control for major, measurable variables, to determine the probability of hiring and compensation outcomes occurring by chance. OFCCP will issue PDNs in matters premised on statistical evidence only if the variable of interest is statistically significant and the probability value (“p value”) is less than 0.05 (roughly equivalent to two standard deviations) if there is corroborating nonstatistical evidence, or 0.01 (roughly equivalent to three standard deviations) in the absence of corroborating nonstatistical evidence.<sup>9</sup> This approach is in keeping with—neither compelled nor prohibited by—Title VII and OFCCP case law, which generally holds that two or more standard deviations is sufficient to establish a *prima facie* case of discrimination.<sup>10</sup>

Statistical evidence plays a crucial role in OFCCP’s enforcement. The proposed rule is intended to provide clarity and transparency in OFCCP’s methods. OFCCP requests comments for improving certainty in setting parameters for statistical evidence, including methodologies, minimum sample sizes, data groupings, methodological limitations, and ways to improve objectivity.

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<sup>9</sup> The p value confidence level is similar to the confidence level associated with the standard deviation test. A p value of less than 0.05 indicates that there is a less than five percent likelihood that an observed disparity occurred by chance, and a standard deviation of two shows a less than 4.55 percent likelihood that an observed disparity occurred by chance.

<sup>10</sup> See fn 8, *supra*; see also, e.g., *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 424 (7th Cir. 2000) (“Two standard deviations is normally enough to ... giv[e] rise to a reasonable inference that the hiring was not race-neutral; the more standard deviations away, the less likely the factor in question played no role in the decisionmaking process.”); *Malave v. Potter*, 320 F.3d 321, 327 (2d Cir. 2003) (vacating summary judgment for employer and instructing district court to determine whether the plaintiff can show “a statistically significant disparity of two standard deviations”); *Anderson v. Zubieta*, 180 F.3d 339–40 (D.C. Cir. 1999) (“Many of the disparities are far in excess of 1.96 standard deviations. Under our case law, this level of statistical significance is sufficient to establish a *prima facie* case of both disparate treatment and disparate impact.” (citations omitted)); *OFCCP v. Bank of America*, No. 1997-OFC-016, slip op. at 9, 2016 WL 2941106 (Dep’t of Labor Apr. 21, 2016) (“Courts have consistently found significance in disparities exceeding the two standard deviation mark. See *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 308, n.14 (1977); *Adams v. Ameritech*, 231 F.3d 414, 424 (7th Cir. 2000). . . . The more severe the statistical disparity, the less additional evidence is needed to prove that the reason was race discrimination. Very extreme cases of statistical disparity may permit the trier of fact to conclude intentional race discrimination occurred without needing additional evidence.” (citations omitted)).

Before issuing a PDN, the agency also considers whether nonstatistical evidence, such as a cohort analysis, demonstrates an intent to discriminate. In some cases, however, when statistical evidence is very strong, OFCCP may issue the PDN without nonstatistical evidence. There may be other factors applicable in a particular case which explain why OFCCP could not uncover nonstatistical evidence during its investigation despite the strength of the statistical evidence. Additionally, OFCCP may find similar patterns of disparity in multiple years or at multiple establishments of a federal contractor that warrant issuing a PDN without nonstatistical evidence. In practice, as an exercise of enforcement discretion, OFCCP will pursue matters where the statistical data are not corroborated by nonstatistical evidence of discrimination only if the statistical evidence is exceptionally strong.<sup>11</sup>

OFCCP issues the PDN to encourage communication with contractors and provide them an opportunity to respond to preliminary findings prior to the issuance of a more formal NOV. If a contractor does not sufficiently rebut the preliminary findings identified in the PDN that evidence of unlawful discrimination exists, OFCCP issues the NOV to notify the contractor that the agency found discrimination violations of one or more of the laws it enforces.

The NOV, also a letter, lists the corrective actions that are required to resolve those violations, and invites conciliation.<sup>12</sup> After issuing the NOV, OFCCP generally pursues a written conciliation agreement with any contractor willing to correct the violation or deficiency

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<sup>11</sup> The proposed rule clarifies that, absent nonstatistical evidence, OFCCP will only pursue a matter when discrimination is indicated by statistically significant evidence at the 99 percent confidence level (*i.e.*, three standard deviations, or a p value of 0.01 or less). Note, however, that for multiple findings of discrimination without nonstatistical evidence present at a given contractor establishment, or at multiple facilities of the same contractor, OFCCP may issue a PDN where at least one finding is supported by statistically significant evidence at the 99 percent confidence level and may include additional findings that are supported by statistically significant evidence at the 95 percent confidence level (*i.e.*, two standard deviations, or a p value of 0.05 or less) or above.

<sup>12</sup> See FCCM Chapter 8, Resolution of Noncompliance and Key Terms and Phrases (Oct. 2014).

identified in the NOV.<sup>13</sup> A conciliation agreement is a binding written agreement between a contractor and OFCCP that details specific contractor commitments, actions, or both to resolve the violations set forth in the agreement.<sup>14</sup> Conciliation agreements were codified in OFCCP's regulations in 1979.<sup>15</sup> If the contractor is unwilling to enter into a conciliation agreement to correct the violations, OFCCP issues a show cause notice (SCN) requiring the contractor to provide reasons demonstrating why formal enforcement proceedings by the Solicitor of Labor or other appropriate action should not be instituted.<sup>16</sup> This proposed rule would codify the PDN and NOV as procedures that have proven effective to remedy findings of discrimination.<sup>17</sup>

Similarly, material violations that are not discriminatory in nature also trigger OFCCP's resolution procedures for compliance evaluations.<sup>18</sup> Rather than initiating resolution with a PDN for violations that do not involve discrimination, OFCCP generally begins the process with a NOV before proceeding to a conciliation agreement, or the SCN as a last resort.<sup>19</sup> With this proposed rule, OFCCP would codify use of the NOV for all material violations.

Additionally, this proposed rule clarifies that federal contractors have the option to bypass the PDN and NOV procedures to enter directly into a conciliation agreement when there

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<sup>13</sup> In rare circumstances, OFCCP may determine that settlement is not appropriate and refer a matter at this stage directly to the Office of the Solicitor of Labor to pursue formal enforcement proceedings rather than pursuing a conciliation agreement. *See* 41 CFR §§ 60-1.26(b), 60-300.62, 60-300.65(a), 60-741.62(a), 60-741.65(a).

<sup>14</sup> *See* FCCM, Key Terms and Phrases and 41 CFR §§ 60-1.33, 60-300.62, and 60-741.62.

<sup>15</sup> *See Compliance Responsibility for Equal Employment Opportunity*, 44 FR 77000 (Dec. 28 1979).

<sup>16</sup> *See* 41 CFR 60-1.28, 60-300.64, and 60-741.64. *See also*, FCCM Chapter 8, Resolution of Noncompliance.

<sup>17</sup> The NOV and PDN have been included in the FCCM since 1988. As an example of their effectiveness, OFCCP obtained \$44 million for more than 37,000 employees and job seekers between January 2017 and December 2019 using these resolution procedures.

<sup>18</sup> FCCM Chapter 8F00, When to Use a Notice of Violation and Chapter 8H00, When to Use a Conciliation Agreement (Oct. 2014). For example, OFCCP may issue a NOV and enter into a CA for failure to maintain records in accordance with 41 CFR § 60-1.12, 41 CFR § 60-300.80, and 41 CFR § 60-741.80, or for failure to maintain affirmative action programs as required by 41 CFR part 60-2, 41 CFR part 60-300, subpart C, and 41 CFR part 60-741, subpart C.

<sup>19</sup> In some instances, OFCCP issues the SCN without first issuing a NOV for material violations that are non-discriminatory in nature. *See* FCCM Chapter 8D01, When a Show Cause Notice is Required (Oct. 2014) (explaining that OFCCP issues the SCN without first issuing a NOV when a contractor fails to provide the records, information, or data requested in the scheduling letter and when the contractor refuses to provide access to its premises for an onsite review).



are preliminary findings of material violations, regardless of whether those violations involve discrimination. This option for conciliation may suit contractors who wish to expedite the resolution of discrimination or other material violations. Recently, OFCCP has sought to incentivize the efficient resolution of material violations for multi-establishment federal contractors with early resolution procedures.<sup>20</sup> The proposed rule would further the agency's efforts to improve efficiency, codifying an expedited option for resolution that would apply to compliance reviews in their early stages.

To further these efficiency objectives and to provide greater certainty to federal contractors, the proposed rule also defines “statistical evidence” and “nonstatistical evidence” to clarify the different types of evidence OFCCP will use to support a PDN or NOV. Specifically, statistical evidence should be based on hypothesis testing related to the probability of the allegedly discriminatory outcome occurring by chance, at the confidence levels accepted in relevant employment discrimination case law.<sup>21</sup> The standard deviation represents a standardized measure of the difference between two rates. As mentioned above, the greater the number of standard deviations, the less likely the difference was produced by chance (*e.g.*, 5.0 standard deviations represents a less than 1 in 1.7 million probability that the occurrence happened by chance). In support of an OFCCP discrimination PDN or NOV, a statistician can conclude that a variable of interest is statistically significant if, controlling for major, measurable variables, a disparity exists that is greater than two standard deviations (equivalent to a p value of less than 0.05 and a confidence value of 95 percent or higher). As noted in the proposed regulatory text

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<sup>20</sup> See Directive 2019-02, “Early Resolution Procedures” (Nov. 30, 2018), available at <https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm> (last accessed Sept. 27, 2019). The proposed rule would not codify OFCCP’s early resolution procedures per se. It would, however, allow OFCCP and contractors to explore expedited conciliation options, such as the early resolution procedures set forth in Directive 2019-02.

<sup>21</sup> *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977).

and preamble discussion regarding predetermination notices, for matters without nonstatistical evidence, OFCCP will only pursue matters if the statistical evidence shows a disparity of at least three standard deviations or a p value of .01 or less. The definition of “statistical evidence” provides a nonexhaustive list of variables frequently used by employers that OFCCP’s regression analyses will control for, as appropriate, in its analyses. This provides greater clarity to the contractor community regarding OFCCP’s analytical methods while providing OFCCP the flexibility to exclude variables from its analyses that, consistent with established statistical methods, may be inappropriate to include, such as those that are discriminatory.

In addition to codifying resolution procedures, the proposed rule replaces outdated references to the official title of OFCCP’s agency head in E.O. 11246 regulations, from “Deputy Assistant Secretary” to “Director.” OFCCP made the same change to the regulations implementing VEVRAA and section 503 through final rules in 2013.<sup>22</sup> OFCCP made this change after the Department of Labor abolished the Employment Standards Administration. This restructuring resulted in the change of title for OFCCP’s agency head, from “Deputy Assistant Secretary” (reporting to the head of the Employment Standards Administration) to “Director” reporting directly to the Secretary of Labor.

### **III. Statement of Legal Authority**

Issued in 1965, and amended several times in the intervening years, E.O. 11246 has two principal purposes. First, it prohibits covered Federal contractors and subcontractors from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, national origin, or because they inquire about, discuss, or disclose

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<sup>22</sup> *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans*, 78 FR 58613 (Sept. 24, 2013), and *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities*, 78 FR 58681 (Sept. 24, 2013).

their compensation or that of others subject to certain limitations. Second, it requires covered Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity. The nondiscrimination and affirmative action obligations of Federal contractors and subcontractors cover all aspects of employment.

The requirements in E.O. 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of \$10,000; (2) has Federal contracts or subcontracts that combined total in excess of \$10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount. Supply and service contractors with 50 or more employees and a single Federal contract or subcontract of \$50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60-2. Construction contractors have different affirmative action requirements under E.O. 11246 at 41 CFR part 60-4.

Enacted in 1973, and amended since, the purpose of section 503 is twofold. First, section 503 prohibits employment discrimination on the basis of disability by Federal contractors and subcontractors. Second, it requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment qualified individuals with disabilities. The requirements in section 503 generally apply to any business or organization that holds a single Federal contract or subcontract in excess of \$15,000.<sup>23</sup> Contractors with 50 or more employees and a single Federal contract or subcontract of \$50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60-741, subpart C.

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<sup>23</sup> Effective October 1, 2010, the coverage threshold under Section 503 increased from \$10,000 to \$15,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See*, Federal Acquisition Regulation; *Inflation Adjustment of Acquisition-Related Thresholds*, 75 FR 53129 (Aug. 30, 2010).

Enacted in 1974 and amended in the intervening years, the purpose of VEVRAA is twofold. First, VEVRAA prohibits federal contractors and subcontractors from discriminating against employees and applicants because of status as a protected veteran (defined by the statute to include disabled veterans, recently separated veterans, Armed Forces Service Medal Veterans, and active duty wartime or campaign badge veterans).<sup>24</sup> Second, it requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans. The requirements in VEVRAA generally apply to any business or organization that holds a single Federal contract or subcontract in excess of \$150,000.<sup>25</sup> Contractors with 50 or more employees and a single Federal contract or subcontract of \$150,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60-300, subpart C.

Pursuant to these laws, receiving a Federal contract comes with a number of responsibilities. Contractors are required to comply with all provisions of these laws as well as the rules, regulations, and relevant orders of the Secretary of Labor. Where OFCCP finds potential noncompliance concerns under any of the three laws or their implementing regulations it utilizes established procedures to either facilitate resolution,<sup>26</sup> or proceed to administrative enforcement as necessary to secure compliance.<sup>27</sup> A contractor found in violation who fails to engage in appropriate resolution procedures may have its contracts canceled, terminated, or suspended and/or may be subject to debarment after the opportunity for a hearing.<sup>28</sup>

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<sup>24</sup> Since the statute was enacted, OFCCP's regulations have further defined "protected veteran" to include "active duty wartime or campaign badge veterans." *See*, 41 CFR 60-300.2(a) and (q).

<sup>25</sup> Effective October 1, 2015, the coverage threshold under VEVRAA increased from \$100,000 to \$150,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See*, Federal Acquisition Regulation; *Inflation Adjustment of Acquisition-Related Thresholds*, 80 FR 38293 (July 2, 2015).

<sup>26</sup> FCCM Chapter 8, Directive 2018-01, Directive 2019-02, 41 CFR §§ 60-1.28, 60-1.33, 60-300.62, 60-300.64, 60-741.62, and 60-741.64.

<sup>27</sup> 41 CFR §§ 60-1.26, 60-300.65, and 60-741.65.

<sup>28</sup> 41 CFR §§ 60-1.27, 60-300.66, and 60-741.66.

#### **IV. Proposed Revisions**

This rulemaking proposes to update outdated references to the head of the agency from “Deputy Assistant Secretary” to the correct title of “Director” throughout the entirety of 41 CFR parts 60-1 and 60-2. It also proposes to add two new definitions and revise a definition in part 60-1, and update parts 60-1, 60-300 and 60-741 to codify established policy and procedures for resolving discrimination and other material violations.

#### **Revised Sections**

##### 41 CFR Part 60-1 – Obligations of Contractors and Subcontractors

Several sections will be revised throughout 41 CFR part 60-1 because all instances of “Deputy Assistant Secretary” would be replaced with the term “Director.” The revised sections would include 41 CFR 60-1.2, 60-1.5, 60-1.7, 60-1.9, 60-1.10, 60-1.21, 60-1.23, 60-1.24, 60-1.25, 60-1.26, 60-1.27, 60-1.28, 60-1.29, 60-1.30, 60-1.31, 60-1.41, 60-1.42, 60-1.43, and 60-1.46. These revisions would correct part 60-1 to the current title for the head of OFCCP.

##### Subpart A – Preliminary Matters; Equal Opportunity Clause; Compliance Reports

##### Section 60-1.3 Definitions

For this section, the NPRM proposes to add two definitions and replace a definition. The term “Nonstatistical evidence” would be added to codify the definition OFCCP uses in guidance.<sup>29</sup> The term “Statistical evidence” clarifies the necessary support for OFCCP to determine that there is a statistically significant disparity caused by an employment action or compensation decision. Both terms are germane to the resolution procedures that this NPRM proposes to codify.

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<sup>29</sup> Directive 2018-05, “Analysis of Contractor Compensation Practices During a Compliance Evaluation” (Aug. 24, 2018), available at <https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm> (last accessed May 16, 2019).

OFCCP would also replace the definition of “Deputy Assistant Secretary” in this section with the definition of “Director” published in OFCCP’s regulations implementing VEVRAA and section 503.<sup>30</sup>

#### Subpart B — General Enforcement; Compliance Review and Complaint Procedure

##### Section 60-1.33 Conciliation Agreements.

The NPRM proposes to revise § 60-1.33 by changing the title to “Resolution Procedures”, and incorporating three new subsections: “Predetermination Notice,” “Notice of Violation,” and “Expedited Conciliation Option.” The resolution procedures would be in the following order: “Predetermination Notice,” “Notice of Violation,” “Conciliation Agreements”, and “Expedited Conciliation Option.”

This revised section would bring the resolution procedures described in the regulations in line with the longstanding resolution procedures that OFCCP utilizes. The update would codify use of the PDN to resolve discrimination violations, would codify the use of the NOV and an expedited conciliation option to resolve discrimination and other material violations, and would codify the types of evidence necessary to find discrimination violations for a PDN or NOV.

#### 41 CFR Part 60-2—Affirmative Action Programs

All instances of “Deputy Assistant Secretary” and “DAS” will be replaced throughout this part with the term “Director.” Specifically, the following sections will be revised: §§ 60-2.1, 60-2.2, and 60-2.31. These revisions would correct part 60-2 to the current title for the head of OFCCP.

#### 41 CFR Part 60-300—Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans

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<sup>30</sup> 41 CFR parts 60-300 and 60-741, respectively.

## Subpart A – Preliminary Matters; Equal Opportunity Clause

### Section 60-300.2 Definitions

For this section, the NPRM proposes to add definitions. The terms “Nonstatistical evidence” and “Statistical evidence” would be added for the same reasons as proposed for section 60-1.3.

## Subpart D — General Enforcement and Complaint Procedures

### Section 60-300.62 Conciliation agreements

The NPRM proposes to revise section 60-300.62 in the same manner as section 60-1.33: changing the title to “Resolution Procedures,” and incorporating three new subsections: “Predetermination Notice,” “Notice of Violation,” and “Expedited Conciliation Option.” The resolution procedures would be in the following order: “Predetermination Notice,” “Notice of Violation,” “Conciliation Agreements,” and “Expedited Conciliation Option.”

## 41 CFR Part 60-741 – Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Individuals with Disabilities

## Subpart A – Preliminary Matters; Equal Opportunity Clause

### Section 60-741.2 Definitions

For this section, the NPRM proposes to add definitions. The terms “Nonstatistical evidence” and “Statistical evidence” would be added for the same reasons as proposed for section 60-1.3.

## Subpart D — General Enforcement and Complaint Procedures

### Section 60-741.62 Conciliation agreements

The NPRM proposes to revise section 60-741.62 in the same manner as section 60-1.33: changing the title to “Resolution Procedures,” and incorporating three new subsections: “Predetermination Notice,” “Notice of Violation,” and “Expedited Conciliation Option.” The

resolution procedures would be in the following order: “Predetermination Notice,” “Notice of Violation,” “Conciliation Agreements,” “Remedial Benchmarks,” and “Expedited Conciliation Option.”

**Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)**

Under Executive Order 12866, OMB’s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of Executive Order 12866 and OMB review. Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866. The Office of Management and Budget has determined that this proposed rule is a significant regulatory action under Executive Order 12866 and has reviewed the proposed rule.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive



Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

### The Need for the Regulation

The proposed regulatory changes are needed to provide certainty regarding the procedures that OFCCP follows during compliance evaluations to resolve employment discrimination and other material violations. The proposed rule is designed to codify procedures for two formal notices, the PDN and the NOV, used by OFCCP when the agency finds potential violations. The proposal promotes efficiency by clarifying that contractors have the option to expedite OFCCP's normal resolution procedures for discrimination findings by entering directly into a conciliation agreement prior to issuance of a PDN or NOV, allowing for a quicker conclusion to OFCCP's compliance evaluations.

### Discussion of Impacts

In this section, the Department presents a summary of the costs associated with the clarified procedures proposed in this notice of proposed rulemaking. The Department determined that there are approximately 420,000 entities registered in the General Services Administration's System for Award Management (SAM) database.<sup>31</sup> Entities registered in the SAM database consist of contractor firms, and other entities such as state and local governments and other organizations that are interested in federal contracting opportunities, and other forms of federal financial assistance. The total number of entities in the SAM database fluctuates and is posted on a monthly basis. The current database includes approximately 420,000 entities. Thus, the

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<sup>31</sup> U.S. General Services Administration, System for Award Management, data released in monthly files, available at <https://www.sam.gov> (last accessed Aug. 13, 2019). The SAM database is an estimate with the most recent download of data occurring August 2019.

Department determines that 420,000 entities are a reasonable representation of the number of entities that may or may not be affected by the proposed rule. This SAM number, however, likely results in an overestimation for two reasons: the system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority. On the other hand, there is at least one reason to believe that the data may result in an underestimation because SAM data does not include all subcontractors.<sup>32</sup>

The estimated labor cost to contractors is reflected in Table 1, below. The mean hourly wage of Human Resources Managers (SOC 11-3121) is \$60.91.<sup>33</sup> The Department adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The Department used a fringe benefits rate of 46 percent<sup>34</sup> and an overhead rate of 17 percent,<sup>35</sup> resulting in a fully loaded hourly compensation rate for Human Resources Managers of \$99.28 ( $\$60.91 + (\$60.91 \times 46 \text{ percent}) + (\$60.91 \times 17 \text{ percent})$ ).

#### Cost of Rule Familiarization

The Department acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for a new information collection requirement the estimated time it takes for

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<sup>32</sup> However, this underestimation may be partially offset because of the overlap among contractors and subcontractors; a firm may have a subcontract on some activities but have a contract on others and thus in fact be included in the SAM data.

<sup>33</sup> BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2018, [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm) (last accessed Aug. 13, 2019).

<sup>34</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. Wages and salaries averaged \$24.26 per hour worked in 2017, while benefit costs averaged \$11.26, which is a benefits rate of 46 percent.

<sup>35</sup> Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program,” (June 10, 2002), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005> (last accessed Aug. 13, 2019).

contractors to review and understand the instructions for compliance. To minimize the burden, OFCCP will publish compliance assistance materials such as a fact sheet and answers to frequently asked questions.

The Department believes that human resources managers at each contractor firm would be the employees responsible for understanding the new regulation. Therefore, the Department estimates that it will take a minimum of 30 minutes (1/2 hour) for a human resources manager at each contractor firm to either read the proposed rule, or read the compliance assistance materials provided by OFCCP to learn more about the codified procedures. Consequently, the estimated burden for rule familiarization is 210,000 hours (420,000 contractor firms  $\times$  1/2 hour). The Department calculates the total estimated cost of rule familiarization as \$20,848,800 (210,000 hours  $\times$  \$99.28/hour) in the first year, which amounts to a 10-year annualized cost of \$2,372,928 at a discount rate of 3 percent (which is \$5.65 per contractor firm) or \$2,774,206 at a discount rate of 7 percent (which is \$6.61 per contractor firm). The Department seeks public comments regarding the estimated number of firms that would review this rule, the estimated time to review the rule, and whether human resources managers would be the most likely staff members to review the rule. Table 1, below, reflects the estimated regulatory familiarization costs for the proposed rule.

<b>Table 1. Regulatory Familiarization Cost</b>	
Total number of contractors	420,000
Time to review rule	30 minutes
Human Resources Managers fully loaded hourly compensation	\$99.28
Regulatory familiarization cost in the first year	\$20,848,800
Annualized cost with 3 percent discounting	\$2,372,928
Annualized cost per contractor with 3 percent discounting	\$5.65

Annualized cost with 7 percent discounting	\$2,774,206
Annualized cost per contractor with 7 percent discounting	\$6.61

The proposed rule does not include any additional costs because it adds no new requirements.

The perpetual annualized cost at 7 percent discounting is \$1,068,622 in 2016 dollars.

### Cost Savings

The Department expects contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions, as well as the clarity of OFCCP's procedures related to resolution of material violations, provides certainty to contractors of what is required as well as an option for contractors to more expeditiously resolve the violations.

If the proposed rule increases clarity for federal contractors, this impact most likely will yield cost savings to taxpayers (if contractor fees decrease because they do not need to engage third party representatives to interpret OFCCP's procedures and requirements). In addition, by increasing clarity for both contractors and for OFCCP enforcement, the proposed rule may reduce the number and costs of enforcement proceedings by making it clearer to both sides at the outset what is required by the regulation.

### Benefits

Executive Order 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important, and states that agencies may consider such benefits. This rule has equity and fairness benefits, which are explicitly recognized in Executive Order 13563. The NPRM is designed to achieve these benefits by:

- Supporting more effective enforcement of the prohibition against employment discrimination;

- Increasing fairness for contractors by providing more transparency and certainty on the agency's resolution procedures;
- Providing more efficient remedies to workers victimized by employment discrimination by effectuating corporate-wide corrective actions in conciliation agreements that may reach more victims than standard establishment-based conciliation agreements; and
- Facilitating a more efficient option for contractors to resolve potential discrimination by providing notice of OFCCP's preliminary findings earlier in the compliance review process.

#### Analysis of Rulemaking Alternatives

In addition to the approach proposed in the NPRM, OFCCP considered alternative approaches. OFCCP considered leaving its resolution procedures described only in agency subregulatory guidance. Though OFCCP codified "conciliation agreements" in 1979, the agency's other resolution procedures, namely the PDN and NOV, have only been explained in subregulatory guidance. Maintaining the status quo has led OFCCP to inconsistent use of the PDN across agency offices, creating inefficiencies and leading to greater uncertainty for federal contractors. Though the agency has taken recent subregulatory measures to increase consistency and certainty, codifying these agency resolution procedures would have a stronger impact and promote more efficient enforcement of Executive Order 11246 than the status quo alternative.

OFCCP also considered revising its resolution procedures, but decided to codify them without modification. Creating new procedures would create new costs to train agency staff and familiarize contractors on the new procedures. Additionally, the longstanding procedures have proven effective as a means for the agency to communicate its findings to contractors and providing contractors an opportunity to respond, facilitating greater understanding and ultimately

resolution. OFCCP seeks comments on other possible alternatives that would minimize the impact of this NPRM while still accomplishing the goals of this rule.

### **Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the business organizations and governmental jurisdictions subject to regulation.” Public Law 96-354. The RFA requires agencies to consider the impact of a proposed regulation on a wide-range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must review whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as described in the RFA.<sup>36</sup>

However if an agency determines that the rule would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear.

The Department must determine the compliance costs of this proposed rule on small contractor firms, and whether these costs will be significant for a substantial number of small contractor firms (*i.e.*, small firms that enter into contracts with the federal government). If the estimated compliance costs for affected small contractor firms are less than 3 percent of small

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<sup>36</sup> *Id.*

contractor firms' revenues, the Department considers it appropriate to conclude that this proposed rule will not have a significant economic impact on small contractor firms.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact. *See, e.g.*, 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex). This threshold is also consistent with that sometimes used by other agencies. *See, e.g.*, 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than 3 percent annually are not economically significant). The Department believes that its use of a 3 percent of revenues significance criterion is appropriate.

A standard definition of "substantial" impact has not been established; however, the EPA provided a determination chart to decide whether a substantial impact exists. If the percentage of all small entities subject to the rule that are experiencing a given economic impact (in this case 3 percent of revenue or greater) is greater than or equal to 15 percent of all entities within that industry, then the economic impact should be considered substantial. The Department has used a threshold of 15 percent of small entities in prior rulemakings for the definition of substantial number of small entities. *See, e.g.*, 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors). According to the Small Business Administration's (SBA's) Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, the determination of what constitutes a substantial number of small entities is open to interpretation, and is primarily

dependent on the size of the industry.<sup>37</sup> Analysts should determine both the total number and percentage of regulated small entities experiencing significant economic impacts when determining whether a substantial number of small entities may be significantly affected.<sup>38</sup>

To analyze the proposed rule's impact on small contractor firms, the Department used as data sources the SBA's Table of Small Business Size Standards<sup>39</sup> and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).<sup>40</sup> Since federal contractors are not limited to specific industries, the Department assessed the impact of this proposed rule across 19 industrial classifications. Because data limitations do not allow the Department to determine which of the small firms within these industries are federal contractors, the Department assumes that these small firms are not significantly different from the small federal contractors that will be directly affected by the proposed rule.

The Department used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of total annual receipts. First, the Department used Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. The Department applied the SBA small-business size standards to the SUSB data to determine the number of small firms in the affected industries. Then the Department used receipts data from the SUSB to calculate the cost per firm as a percentage of total receipts by dividing the estimated first year cost and the annualized cost per firm discounted at a 7 percent rate by the average annual receipts per firm.

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<sup>37</sup> Small Business Administration, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (August 2017), <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

<sup>38</sup> Final Guidance for EPA Rulewriters: Regulatory Flexibility Act (November 2006), section 2.7.2, <https://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf> (last accessed Sept. 27, 2019).

<sup>39</sup> See [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf) (last accessed Sept. 27, 2019).

<sup>40</sup> See <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html> (last accessed Sept. 27, 2019).



The methodology and results of two industries (construction and management of companies and enterprises) are presented in Tables 2 and 3.

In sum, the increased first year cost and annualized cost of compliance resulting from the proposed rule are *de minimis* relative to the revenue at small contractor firms no matter their size. All of the industries had a first year cost and annualized cost per firm as a percentage of receipts of less than 3 percent. For instance, the first year cost for the construction industry is estimated to range from 0.00 percent of revenue for firms that have average annual receipts of approximately \$35.3 million to 0.09 percent of revenue for firms that have average annual receipts below \$52,000. Likewise, the annualized cost for the construction industry is estimated to range from 0.00 percent of revenue for firms that have average annual receipts of approximately \$35.3 million to 0.01 percent of revenue for firms that have average annual receipts below \$52,000. Management of companies and enterprises is the industry with the highest relative first year costs, with a range of 0.00 percent for firms that have average annual receipts of approximately \$2.3 million to 0.15 percent for firms that have average annual receipts below \$31,000. With respect to the annualized costs for the management of companies and enterprises industry, the impact as a percentage of revenue ranges from 0.00 percent for firms that have average annual receipts of approximately \$2.3 million to 0.02 percent for firms that have average annual receipts below \$31,000.

Therefore, the Department does not expect this rule to have a significant economic impact on a substantial number of small entities. The annualized cost at a discount rate of 7 percent for rule familiarization is \$6.61 per entity (\$46.39 in the first year) which is far less than 1 percent of the annual revenue of the smallest of the small entities affected by the proposed rule.

Accordingly, OFCCP certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

Table 2. Cost per Small Firm in the Construction Industry								
Small Business Size Standard: \$15 million - \$36.5 million								
	Number of Firms	Total Number of Employees	Annual Receipts	Average Receipts per Firm <sup>1</sup>	First Year Cost per Firm with 7% Discounting	First Year Cost per Firm as Percent of Receipts <sup>2</sup>	Annualized Cost per Firm with 7% Discounting	Annual Cost per Firm as Percent of Receipts <sup>3</sup>
Firms with sales/receipts/revenue below \$100,000	119,538	N/A	\$6,116,019,000	\$51,164	\$46.39	0.09%	\$6.61	0.01%
Firms with sales/receipts/revenue of \$100,000 to \$499,999	262,870	569,763	\$67,195,728,000	\$255,623	\$46.39	0.02%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$500,000 to \$999,999	100,006	466,370	\$70,808,134,000	\$708,039	\$46.39	0.01%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	85,343	742,370	\$133,337,229,000	\$1,562,369	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	35,670	585,723	\$123,598,328,000	\$3,465,050	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	12,306	327,911	\$74,430,329,000	\$6,048,296	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	6,179	214,777	\$52,933,597,000	\$8,566,693	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	6,752	299,412	\$80,939,071,000	\$11,987,422	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	3,272	190,075	\$55,527,769,000	\$16,970,590	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	2,002	136,366	\$43,498,052,000	\$21,727,299	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	1,365	107,700	\$36,048,227,000	\$26,408,958	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	909	80,081	\$28,368,318,000	\$31,208,271	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	638	64,770	\$22,506,667,000	\$35,276,908	\$46.39	0.00%	\$6.61	0.00%
N/A = not available, not disclosed								
<sup>1</sup> In the case of construction firms with receipts below \$100,000, the average receipts per firm (\$51,164) was derived by dividing the total annual receipts (\$6,116,019,000) by the number of firms (119,538).								
<sup>2</sup> In the case of construction firms with receipts below \$100,000, the first year cost per firm as percent of receipts (.09 percent) was derived by dividing the first year cost per firm (\$46.39) by the average receipts per firm (\$51,164).								
<sup>3</sup> In the case of construction firms with receipts below \$100,000, the annualized cost per firm as percent of receipts (.01 percent) was derived by dividing the annualized cost per firm (\$6.61) by the average receipts per firm (\$51,164).								

Table 3. Cost per Small Firm in the Management of Companies and Enterprises Industry								
	Small Business Size Standard: \$20.5 million							
	Number of Firms	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm with 7% Discounting	First Year Cost per Firm as Percent of Receipts	Annualized Cost per Firm with 7% Discounting	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below \$100,000	1,107	7,938	\$33,849,000	\$30,577	\$46.39	0.15%	\$6.61	0.02%
Firms with sales/receipts/revenue of \$100,000 to \$499,999	1,216	4,631	\$251,252,000	\$206,622	\$46.39	0.02%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$500,000 to \$999,999	743	5,764	\$285,686,000	\$384,503	\$46.39	0.01%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	1,668	17,384	\$783,830,000	\$469,922	\$46.39	0.01%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	2,016	26,218	\$1,395,007,000	\$691,968	\$46.39	0.01%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	1,602	26,210	\$1,567,547,000	\$978,494	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	1,229	22,064	\$1,528,733,000	\$1,243,884	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,969	42,504	\$2,727,035,000	\$1,384,985	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	1,454	36,455	\$2,687,284,000	\$1,848,201	\$46.39	0.00%	\$6.61	0.00%
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	1,114	27,887	\$2,617,195,000	\$2,349,367	\$46.39	0.00%	\$6.61	0.00%

## Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there is no new requirement for information collection associated with this proposed rule. The information collection contained in the existing Executive Order 11246 regulations are currently approved under OMB Control Number 1250-0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control Number

1250-0003 (Recordkeeping and Reporting Requirements – Supply and Service). Consequently, this proposed rule does not require review by the Office of Management and Budget under the authority of the Paperwork Reduction Act.

#### **Unfunded Mandates Reform Act of 1995**

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rule does not include any Federal mandate that may result in excess of \$100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

#### **Executive Order 13132 (Federalism)**

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

#### **Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)**

This proposed rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### **List of Subjects**

41 CFR Parts 60-1 and 60-2

Administrative practice and procedure, Civil rights, Discrimination, Employment, Equal employment opportunity, Government contracts, Government procurement, Labor

41 CFR Parts 60-300 and 60-741

Administrative practice and procedure, Civil rights, Discrimination, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Labor, Veterans

**Craig E. Leen,**

*Director, Office of Federal Contract Compliance Programs.*

For the reasons stated in the preamble, the Office of Federal Contract Compliance Programs proposes to amend 41 CFR parts 60-1, 60-2, 60-300, and 60-741 as follows:

**PART 60-1 [AMENDED]**

1. The authority citation for part 60-1 continues to read as follows:

Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964-1965 Comp., p. 339, as amended by E.O.

11375, 32 FR 14303, 3 CFR, 1966-1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

2. In part 60-1, remove the words “Deputy Assistant Secretary” and adding in their place the word “Director”.

3. Amend § 60-1.3 by removing the definition for “Deputy Assistant Secretary” and adding definitions for “Director”, “Nonstatistical evidence” and “Statistical evidence” in alphabetical order to read as follows:

### **§60-1.3 Definitions.**

\* \* \* \* \*

*Director* means the Director, Office of Federal Contract Compliance Programs of the United States Department of Labor, or his or her designee.

\* \* \* \* \*

*Nonstatistical evidence* may include testimony about biased statements, remarks, attitudes, or acts based upon membership in a protected class; differential treatment through review of comparators, cohorts, or summary data reflecting differential selections, compensation and/or qualifications; testimony about individuals denied or given misleading or contradictory information about employment or compensation practices; testimony about the extent of discretion or subjectivity involved in making employment decisions; or other anecdotal or supporting evidence.

\* \* \* \* \*

*Statistical evidence* means hypothesis testing, controlling for the major, measureable parameters and variables used by employers (including, as appropriate, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a difference in employment selection rates or compensation decisions is statistically significant by reference to any one of these statements:

1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more);

- 2) The Z statistic has a value greater than two; or
- 3) The probability value is less than 0.05.

\* \* \* \* \*

4. Revise section 60-1.33 to read as follows:

**§60-1.33 Resolution Procedures.**

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates preliminary findings of discrimination, OFCCP will only issue a predetermination notice after first considering these factors: whether the unexplained disparity is both practically and statistically significant (as described in this part's definition of "Statistical evidence") and, where relevant, whether nonstatistical evidence demonstrates an intent to discriminate. If OFCCP cannot corroborate statistical evidence with nonstatistical evidence, OFCCP will issue a predetermination notice only when the statistical evidence is significant at a confidence level of 99% or higher, which equates to three or more standard deviations or a p value of 0.01 or less. A contractor must respond to a predetermination notice within 15 calendar days of receipt of the notice, which OFCCP may extend for good cause.

(b) *Notice of Violation.* If a compliance review or other review by OFCCP indicates preliminary findings of discrimination or other material violations of the equal opportunity clause, OFCCP may issue a notice of violation to provide notice to the contractor requiring corrective action and inviting conciliation through a written agreement. For discrimination violations, OFCCP may issue the notice of violation following issuance of a predetermination notice if the contractor does not respond or provide a sufficient response within 15 calendar days of receipt of the notice, unless OFCCP has extended the predetermination notice response time for good cause shown.

(c) *Conciliation Agreement.* If a compliance review, complaint investigation or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies, and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Expedited Conciliation Option.* A contractor may waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement.

## **PART 60-2—AFFIRMATIVE ACTION PROGRAMS**

5. The authority citation for part 60-2 continues to read as follows:

Sec. 201, E.O. 11246, 30 FR 12319, E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501, and E.O. 13672, 79 FR 42971

### **§60-2.1 [Amended]**

6. Amend §60-2.1 by removing the words “Deputy Assistant Secretary” and r adding in their place “Director”.

### **§60-2.2 [Amended]**

7. Amend §60-2.2 by removing the words “Deputy Assistant Secretary” and adding in their place “Director”.

### **§60-2.31 [Amended]**



8. Amend §60-2.31 by removing the words “Deputy Assistant Secretary” and adding in their place “Director.”

**PART 60-300—AFFIRMATIVE ACTION AND NONDISCRIMINATION**

**OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS**

**REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS,  
ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED  
FORCES SERVICE MEDAL VETERANS**

9. The authority citation for part 60-300 continues to read as follows:

29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

10. Amend section 60-300.2 by adding definitions for “Nonstatistical evidence” and “Statistical evidence” in alphabetical order to read as follows:

**§60-300.2 Definitions.**

\* \* \* \* \*

*Nonstatistical evidence* may include testimony about biased statements, remarks, attitudes, or acts based upon membership in a protected class; differential treatment through review of comparators, cohorts, or summary data reflecting differential selections, compensation and/or qualifications; testimony about individuals denied or given misleading or contradictory information about employment or compensation practices; testimony about the extent of discretion or subjectivity involved in making employment decisions; or other anecdotal or supporting evidence.

\* \* \* \* \*

*Statistical evidence* means hypothesis testing, controlling for the major, measureable parameters and variables used by employers (including, as appropriate, other demographic variables, test

scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a difference in employment selection rates or compensation decisions is statistically significant by reference to any one of these statements:

- 1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more);
- 2) The Z statistic has a value greater than two; or
- 3) The probability value is less than 0.05.

\* \* \* \* \*

11. Revise section 60-300.62 to read as follows:

**§60-300.62 Resolution Procedures.**

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates preliminary findings of discrimination, OFCCP will only issue a predetermination notice after first considering these factors: whether the unexplained disparity is both practically and statistically significant (as described in this part’s definition of “Statistical evidence”) and, where relevant, whether nonstatistical evidence demonstrates an intent to discriminate. If OFCCP cannot corroborate statistical evidence with nonstatistical evidence, OFCCP will issue a predetermination notice only when the statistical evidence is significant at a confidence level of 99% or higher, which equates to three or more standard deviations or a p value of 0.01 or less. A contractor must respond to a predetermination notice within 15 calendar days of receipt of the notice, which OFCCP may extend for good cause.

(b) *Notice of Violation.* If a compliance review or other review by OFCCP indicates preliminary findings of discrimination or other material violations of the equal opportunity clause, OFCCP may issue a notice of violation to provide notice to the contractor requiring corrective action and inviting conciliation through a written agreement. For discrimination violations, OFCCP may issue the notice of violation following issuance of a predetermination notice if the contractor does not respond or provide a sufficient response within 15 calendar days of receipt of the notice, unless OFCCP has extended the predetermination notice response time for good cause shown.

(c) *Conciliation Agreement.* If a compliance review, complaint investigation or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies, and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Expedited Conciliation Option.* A contractor may waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement.

## **PART 60-741 – AFFIRMATIVE ACTION AND NONDISCRIMINATION**

### **OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS**

#### **REGARDING INDIVIDUALS WITH DISABILITIES**

12. The authority citation for part 60-741 continues to read as follows:

29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

13. Amend section 60-741.2 by adding definitions for “Nonstatistical evidence” and “Statistical evidence” in alphabetical order to read as follows:

**§60-741.2 Definitions.**

\* \* \* \* \*

*Nonstatistical evidence* may include testimony about biased statements, remarks, attitudes, or acts based upon membership in a protected class; differential treatment through review of comparators, cohorts, or summary data reflecting differential selections, compensation and/or qualifications; testimony about individuals denied or given misleading or contradictory information about employment or compensation practices; testimony about the extent of discretion or subjectivity involved in making employment decisions; or other anecdotal or supporting evidence.

\* \* \* \* \*

*Statistical evidence* means hypothesis testing, controlling for the major, measureable parameters and variables used by employers (including, as appropriate, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a difference in employment selection rates or compensation decisions is statistically significant by reference to any one of these statements:

1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more);

- 2) The Z statistic has a value greater than two; or
- 3) The probability value is less than 0.05.

\* \* \* \* \*

14. Revise section 60-741.62 to read as follows:

**§60-741.62 Resolution Procedures.**

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates preliminary findings of discrimination, OFCCP will only issue a predetermination notice after first considering these factors: whether the unexplained disparity is both practically and statistically significant (as described in this part's definition of "Statistical evidence") and, where relevant, whether nonstatistical evidence demonstrates an intent to discriminate. If OFCCP cannot corroborate statistical evidence with nonstatistical evidence, OFCCP will issue a predetermination notice only when the statistical evidence is significant at a confidence level of 99% or higher, which equates to three or more standard deviations or a p value of 0.01 or less. A contractor must respond to a predetermination notice within 15 calendar days of receipt of the notice, which OFCCP may extend for good cause.

(b) *Notice of Violation.* If a compliance review or other review by OFCCP indicates preliminary findings of discrimination or other material violations of the equal opportunity clause, OFCCP may issue a notice of violation to provide notice to the contractor requiring corrective action and inviting conciliation through a written agreement. For discrimination violations, OFCCP may issue the notice of violation following issuance of a predetermination notice if the contractor does not respond or provide a sufficient response within 15 calendar days of receipt of the notice, unless OFCCP has extended the predetermination notice response time for good cause shown.

(c) *Conciliation Agreement.* If a compliance review, complaint investigation or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies, and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Remedial benchmarks.* The remedial action referenced in paragraph (c) of this section may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

(e) *Expedited Conciliation Option.* A contractor may waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement.

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